

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)	
)	
WILLIAM EDWIN DAY,)	CASE NO. 05-33219 HCD
)	CHAPTER 11
)	
DEBTOR.)	
)	
)	
WILLIAM EDWIN DAY,)	
)	
PLAINTIFF,)	
vs.)	PROC. NO. 05-3121
)	
BANK OF AMERICA MORTGAGE)	
CONSUMER SERVICE, ET AL.,)	
)	
DEFENDANTS.)	

Appearances:

William Edwin Day, pro se, 402 1/2 South Half Street, North Manchester, Indiana 46962;

Timothy L. Black, Esq., attorney for defendant Bank of America Mortgage Consumer Service, Feiwell & Hannoy, P.C., 251 North Illinois Street, Suite 1700, P.O. Box 44141, Indianapolis, Indiana 46204; and

James A. O'Brien, Esq., attorney for defendant Cynthia Day, O'Brien & Telloyan, P.C., P.O. Box 449, South Bend, Indiana 46624-0449.

MEMORANDUM OF DECISION

At South Bend, Indiana, on April 6, 2006.

Before the court are the Complaint filed by the debtor William Edwin Day ("debtor" or "plaintiff"), the Answer filed by Cynthia Day ("defendant Cynthia Day"), and the Motion to Dismiss filed by Bank of America Mortgage Consumer Service ("defendant BOA"). Now that the time for filing responses has passed, the court has considered the issues presented. For the reasons stated below, the court now grants BOA's Motion to Dismiss and dismisses the Complaint as to all defendants.

Jurisdiction

Pursuant to 28 U.S.C. § 157(a) and Northern District of Indiana Local Rule 200.1, the United States District Court for the Northern District of Indiana has referred this case to this court for hearing and determination. After reviewing the record, the court determines that the matter before it is a core proceeding within the meaning of § 157(b)(2)(O) over which the court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1) and 1334. This entry shall serve as findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52, made applicable in this proceeding by Federal Rules of Bankruptcy Procedure 7052 and 9014. Any conclusion of law more properly classified as a factual finding shall be deemed a fact, and any finding of fact more properly classified as a legal conclusion shall be deemed a conclusion of law.

Background

A. Procedural History

On June 10, 2005, Mr. Day filed a chapter 11 bankruptcy petition. Defendant BOA, a secured creditor, held a claim secured by real property located on Crooked Oak Drive in Granger, Indiana. BOA held the mortgage and promissory note on the property. On August 17, 2005, BOA filed a Motion for Relief from Stay and to Abandon Real Estate or in the Alternative Adequate Protection. The debtor and others objected to the motion. On December 2, 2005, the court conducted a hearing on the motion and objections. After hearing the testimony of witnesses and arguments of counsel, and after reviewing the evidence presented, the court granted BOA's motion. It lifted the stay and abandoned the real estate subject to the mortgage pursuant to 11 U.S.C. § 362(d)(1). No appeal of that decision was made. *See* Fed. R. Bankr. P. 8002. The court finds, therefore, that the Order of December 2, 2005, is a final non-appealable order of this court.

On December 23, 2005, the pro se debtor filed a Complaint against 32 defendants.¹ *See* R. 1. Although the procedural requirements for serving the Complaint were explained to him by the deputy clerks in the bankruptcy court, the Complaint was not properly served on the necessary parties until February 23, 2006.²

Once the Complaint was served, an answer was required within 30 days. Fed. R. Bankr. P. 7012(a). Defendant Cynthia Day timely filed an Answer on March 2, 2006, *see* R. 45, and the defendant BOA timely filed a Motion to Dismiss and supporting brief on March 3, 2006, *see* R. 47. The plaintiff did not file a reply to the Answer within twenty days after service of the Answer. *See* Fed. R. Bankr. P. 7012(a). Nor did he file a response to the Motion to Dismiss within thirty days after service of the motion. *See* N.D.Ind. L.B. R. B-7007-1(a). The time having expired for the plaintiff's response to the answer and dismissal motion, the court now determines the issues without argument or hearing. *See* N.D. Ind. L.B.R. B-7007-2(a).

B. Allegations in Plaintiff's Complaint

In his Complaint, the plaintiff raised allegations concerning his mortgage contract with BOA and BOA's demand for payment under that mortgage. The allegations, difficult to summarize, are reprinted verbatim below:

6. Day alleges that Bank of America, through its agents/employees did not satisfy "informed consent" in providing certain relevant legal facts of the mortgage note to Day. (Specifically but not limited to)

¹ On the same date, the debtor filed a Request in the Nature of a Motion to Withdraw the Reference. *See* R. 2. On March 16, 2006, the United States District Court for the Northern District of Indiana, South Bend Division, dismissed Mr. Day's Motion to withdraw reference to the district court and ordered the case in the district court closed. *See* Opinion and Order (N.D. Ind. March 16, 2006) (unpub'd).

² At first, the debtor plaintiff did not pay the filing fee or file the proof of service of the motion and civil cover sheet when he filed the Complaint. Once he accomplished those prerequisites, the bankruptcy court completed the Summons forms and issued them to the plaintiff on January 19, 2006. Despite further explanations by a deputy clerk, the plaintiff did not timely serve the Complaint. When he returned to the court on February 2, 2006, to acknowledge this inaction, a deputy clerk issued an Alias Summons to him. However, the plaintiff did not execute the Alias Summons on the necessary parties until February 23, 2006. At that point, the deadline for filing an answer was March 27, 2006.

A. “In order to constitute a loan there must be a contract whereby one party transfers to the other a sum of money.” U.S.v. NIEBERT WHITE 247 F.SUP.878

B. “The thing given or taken in exchange must be specific and so distinguishable from other things of like kind as to be clearly known and identifiable.” PRESTON v KEEUE 14 PET 133.

C. “A contract made by a corporation beyond scope of its corporate is unlawful and void.” McCORMICK v, MARKET NATL. BANK 165 U.S. 538.

7. Day alleges Bank of America brought and loaned its “credit” within the transaction/contract. “Nowhere is the express authority given to the corporation to lend it credit.” GARDINER TRUST v. AUGUSTA TRUST, 134 ME 191; 291 US 245

8. Day alleges Bank of America violated 31 United States code subsection 371 and 12 United States subsection 152 that the value (substance) of the loan was in the nature of Valuable Consideration called “money”, when in reality it was Day’s signature that “created” out of thin air, in a nature of bookkeeping entry, thereby risking nothing and loaning nothing of its own substance.

9. Day alleges that on or about October 21st, 2005 Bank of America demanded payment in Bankruptcy Court thereby diminishing other creditors equal opportunity to recover.

10. Day alleges that on or about October 21st, 2005 Bank of America demanded payment in Bankruptcy Court, that actual or threatened exercise of power over property of another is coercion and duress which will render payment involuntary.

11. Day alleges that “property” referred to in paragraph 10 is the legal protection of the Bankruptcy Court afforded to all persons in bankruptcy proceedings.

R. 1 at 3-4. The Complaint also alleged that (a) the decree of dissolution of marriage, in which Judge Jenny Pitts Manier, Judge of the St. Joseph Superior Court, “had a significant role,” should be held as a void judgment; (b) the Internal Revenue Service has no claim over him because he is not an “employee” as defined in § 3401(c), presumably of the Internal Revenue Code; and (c) the Indiana Department of Revenue has no claim over him because he does not owe federal taxes. *See id.* at 2-3. After proclaiming that the “filing of this document does not constitute paper terrorism or simulation of legal process,” the plaintiff requested only an evidentiary hearing. *See id.* at 4.

The defendant Cynthia Day filed an Answer and asked that the Complaint be dismissed. The defendant BOA, in its Motion to Dismiss, sought dismissal based on the court’s lack of subject matter jurisdiction,

the barring of the cause of action by the doctrine of *res judicata*, and the Complaint's failure to state a claim upon which relief can be granted. The plaintiff did not file a reply to the Answer, an objection to the Motion to Dismiss, or an amendment to the Complaint. By not responding to the dismissal motion, the plaintiff has offered no opposition to BOA's request for dismissal.

Discussion

The Federal Rules of Civil Procedure require that a complaint set out “‘a short and plain statement of the claim’ that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.” *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 103, 2 L.Ed.2d 80 (1957) (quoting Fed. R. Civ. P. 8(a)(2)); *see also Mosely v. Board of Educ.*, 434 F.3d 527, 533 (7th Cir. 2006). “The complaint must contain sufficient details so that this court can determine whether or not a justiciable claim exists as to each Defendant.” *Stone v. Baum*, 409 F. Supp. 2d 1164, 1173 (D. Ariz. 2005) (citing Fed. R. Civ. P. 8(a)) (finding that neither the defendants nor the court could determine whether the plaintiffs stated “a justiciable claim against each and every Defendant”).

Both Cynthia Day and BOA have asked the court to dismiss Mr. Day’s Complaint. BOA specifically seeks dismissal for lack of jurisdiction over the subject matter and for failure to state a claim, pursuant to Federal Rule of Civil Procedure 12(b)(1) and (b)(6). In *Conley*, the Supreme Court set forth the rule of law under Rule 12(b)(6):

In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Id. at 45-46; 78 S. Ct. at 102; *see also Cody v. Harris*, 409 F.3d 853, 857 (7th Cir. 2005); *Autry v. Northwest Premium Services, Inc.*, 144 F.3d 1037, 1039 (7th Cir. 1998). “Subsumed within the rigorous standard of the *Conley* test is the requirement that the plaintiff’s complaint be stated with enough clarity to enable a court or an

opposing party to determine whether a claim is sufficiently alleged.” *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001), *cert. denied sub nom. Cloud v. United States*, 536 U.S. 960 (2002) (citation omitted).

The Seventh Circuit presented the method for analysis of a Rule 12(b)(1) claim in *United Phosphorus, Ltd. v. Angus Chemical Co.*, 322 F.3d 942 (7th Cir.) (en banc), *cert. denied*, 540 U.S. 1003 (2003):

. . . Federal Rule of Civil Procedure 12(b)(1) . . . provides for dismissal of an action for lack of subject matter jurisdiction. Subject matter jurisdiction is, as we know, an issue that should be resolved early but must be considered at any stage of the litigation. If subject matter jurisdiction is not evident on the face of the complaint, the motion to dismiss pursuant to Rule 12(b)(1) would be analyzed as any other motion to dismiss, by assuming for purposes of the motion that the allegations in the complaint are true. However, as here, if the complaint is formally sufficient but the contention is that there is in fact no subject matter jurisdiction, the movant may use affidavits and other material to support the motion. The burden of proof on a 12(b)(1) issue is on the party asserting jurisdiction. And the court is free to weigh the evidence to determine whether jurisdiction has been established.

Id. at 946 (citations omitted). The Supreme Court has underscored the fact that an objection to a federal court’s subject matter jurisdiction under Rule 12(b)(1) “may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment.” *Arbaugh v. Y & H Corp.*, ___ U.S. ___, 126 S.Ct. 1235, 1240, ___ L.Ed.2d ___ (2005). The Supreme Court has also pointed out that a “patently insubstantial complaint may be dismissed, for example, for want of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1).” *Neitzke v. Williams*, 490 U.S. 319, 326 n.6, 109 S. Ct. 1827, 1832 n.6, 104 L.Ed2d 338 (1989) (citing *Hagans v. Lavine*, 415 U.S. 528, 536-537, 94 S.Ct. 1372, 1378-79, 39 L.Ed.2d 577 (1974) (federal courts lack power to entertain claims that are “so attenuated and unsubstantial as to be absolutely devoid of merit”) (citation omitted); *Bell v. Hood*, 327 U.S. 678, 682-683, 66 S.Ct. 773, 776-76, 90 L.Ed. 939 (1946)).

Specifically within the bankruptcy context, Rule 12(b)(1) has been applied in cases in which the property at issue is not part of the bankruptcy estate:

Courts have consistently held that, if a controversy does not involve property in which the debtor’s estate asserts an interest, and the resolution of the claim will not affect the administration of the estate, then the bankruptcy court has no subject matter jurisdiction to adjudicate the claim.

Dircks v. Global Fin'l Credit, L.L.C. (In re Dircks), 329 B.R. 687, 693 (Bankr. C.D. Ill. 2005) (quoting *In re World Wines, Ltd.*, 77 B.R. 653, 655-56 (Bankr. N.D. Ill. 1987)) (finding that the court lacked subject matter jurisdiction over the proceeding). With these guidelines in mind, the court will consider each of the defendants.

A. Defendant Cynthia Day

This defendant is not mentioned in any of the allegations of the Complaint. Nevertheless, she answered the Complaint as to each of the paragraphs to which she had sufficient knowledge to admit or deny the allegations. *See* R. 45. Her responses were in the nature of informative advisory comments about allegations concerning other defendants. She requested that the Complaint be dismissed and that the plaintiff be ordered to pay all costs related to the adversary proceeding.

Because the defendant Cynthia Day is not named in any paragraph of the plaintiff's Complaint, the court finds that the Complaint does not allege any well-pleaded factual assertions that establish a claim against her. It also finds that the Complaint does not give Cynthia Day sufficient notice of any charges against her so that she can defend against them. It determines, therefore, that the Complaint is insufficient as to this defendant and consequently is dismissed as to Cynthia Day. *See Vogt v. Greenmarine Holding, LLC*, 318 F.Supp.2d 136, 145 (S.D.N.Y. 2004) (granting dismissal of complaint in part because it did not sufficiently allege claims against specific defendants).

B. Defendant BOA

Defendant BOA's motion to dismiss the Complaint is based on Rule 12(b)(1) and Rule 12(b)(6) of the Federal Rules of Civil Procedure and Rule 7012 of the Federal Rules of Bankruptcy Procedure. It argued that this court lacks jurisdiction over the subject matter; that the cause of action is barred by the doctrine of *res judicata*; and that the Complaint fails to state a claim upon which relief can be granted.

The court takes judicial notice of its Order of December 2, 2005, which granted BOA relief from the automatic stay and abandonment of Mr. Day's real property. The real estate (which was subject to the mortgage held by BOA) was abandoned from the bankruptcy estate. Once real estate is abandoned, the trustee and the bankruptcy estate are divested of any interest in, or control over, that abandoned property, and title reverts in the debtor. *See Newkirk v. Wasden (In re Bray)*, 288 B.R. 305, 307 (Bankr. S.D. Ga. 2001); *First Georgia Bank v. FNB South (In re Moody)*, 277 B.R. 858, 861 (Bankr. S.D. Ga. 2001). The abandoned property no longer is part of the bankruptcy estate. Thereafter, the property is available to the debtor or creditors of the debtor to the extent that they have an interest in the property under state law.

In this case, once the debtor's property was abandoned pursuant to the court's order, BOA, as primary lien holder, could begin a foreclosure action on the property "and any such action would have no impact on the administration of the bankruptcy estate." *In re Moody*, 277 B.R. at 861; *see also Sherrell v. Fleet Bank (In re Sherrell)*, 205 B.R. 20, 22 (N.D.N.Y. 1997) (finding that, when court granted request to abandon legal claims, the claims "were irrevocably abandoned") . The court finds that it lost subject matter jurisdiction over the debtor's property once the appeal period had passed and the order became final. It also lost jurisdiction over any issues relating to such property, since the outcome of a dispute about the property or its underlying mortgage could have no impact on the bankruptcy estate or distributions to creditors. *See Dircks v. Global Fin'l Credit, L.L.C. (In re Dircks)*, 329 B.R. 687, 691-92 (Bankr. C.D. Ill. 2005) (concluding that, once a personal injury claim was abandoned, the court's determination of whether the underlying agreement was valid "will have no effect on the bankruptcy estate"); *Israel v. Dep't of Treasury (In re Israel)*, 112 B.R. 481, 484 (Bankr. D. Conn. 1990) (finding that court had no jurisdiction to determine validity of IRS lien against abandoned property). Accordingly, the court dismisses the Complaint against the defendant BOA pursuant to Rule 12(b)(1).

The court also grants dismissal on the ground that the motion is uncontested. The plaintiff neither filed a response to the dismissal motion nor requested an extension of time in which to respond. A party opposing a dismissal motion is given thirty days to file a response. *See* N.D. Ind. L.B.R. B-7007-1. The plaintiff failed

to meet the deadline. *See, e.g., Eglinton v. Loyer (In re G.A.D., Inc.)*, 340 F.3d 331, 335 (6th Cir. 2003) (affirming bankruptcy court's dismissal order after litigant failed to timely respond to dismissal motion on ground that the procedural rules are straightforward and clear). The court deems this lack of response to be a waiver of the opportunity to do so. *See* N.D. Ind. L.B.R. B-7007-1; *see also McGlothlin v. Resolution Trust Corp.*, 913 F. Supp. 15, 19 (D.C. 1996), *aff'd*, 111 F.3d 963 (D.C. Cir. 1997) (treating plaintiff's failure to respond as a concession to defendant's motion to dismiss, granting dismissal). The Complaint therefore is dismissed as to defendant BOA on the grounds of waiver and lack of subject matter jurisdiction.

C. Judge Jenny Pitts Manier

The Complaint alleges that the Honorable Jenny Pitts Manier, Judge of the St. Joseph Superior Court, “had a significant role in ‘FINDING OF FACT AND DECREE OF DISSOLUTION OF MARRIAGE’ in Day’s subsequent bankruptcy in her unequal property distribution.” R. 1, ¶ 2. It further alleges that she “had no oath of office for her current term,” and therefore “this [presumably the dissolution decree] should be held as a void judgment.” *Id.* at ¶ 1. However, the state court judge was not listed as a defendant in the Complaint’s caption. The Complaint failed to name her as a proper party defendant. *See* Fed. R. Bankr. P. 7017(a).

Because Judge Manier was not named as a defendant, the Complaint was not served on her. Without service of process, she did not receive notice of the alleged claims against her and could not respond to the allegations raised by Mr. Day. The court will not consider any allegations against a non-party to this case. *See Bessette v. Avco Fin’l Servs., Inc.*, 279 B.R. 442, 454 (D.R.I. 2002) (finding that the complaint failed to name a known defendant who could be served and be given notice of the complaint, concluding that it was “futile to maintain litigation where there is no opposing party that can respond to the allegations”).

In any case, the judge is entitled to absolute immunity. *See Dawson v. Newman*, 419 F.3d 656, 660 (7th Cir. 2005); *Stone*, 409 F. Supp. 2d at 1175. Accordingly, the Complaint as to Judge Jenny Pitts Manier is dismissed on the ground of judicial immunity.

C. Defendants Internal Revenue Service (“IRS”) and Indiana Department of Revenue (“IDR”)

The plaintiff claimed that he “failed to see why Internal Revenue Service has any claim against him” because he is not an “employee” as defined in section 3401(c). He also “failed to see why Indiana Department of Revenue has claim against him” because it uses adjusted gross income when calculating taxes and “Day alleges had he [*sic*] no federal tax due.” R. 1, ¶¶ 3,4.

It is evident that the Complaint’s claims are not clear; they are not well-pleaded factual allegations against the IRS and IDR that are grounded in law and fact. However, the court dismisses the allegations against the IRS and IDR on jurisdictional grounds. The plaintiff in effect asks this court to declare that he does not owe federal or state taxes. However, this court is without jurisdiction, under the Declaratory Judgment Act, to grant declaratory relief in controversies “with respect to Federal taxes.” *See* 28 U.S.C. § 2201; *see also Schon v. United States*, 759 F.2d 614, 617-18 (7th Cir. 1985); *Granse v. United States*, 932 F.Supp. 1162, 1165-66 (D. Minn. 1996), *aff’d*, 112 F.3d 513 (8th Cir. 1997); *Votzmeyer v. United States*, 202 B.R. 235, 236 (S.D. Tex. 1996). It is true that the Act exempts certain proceedings involving federal taxes in the bankruptcy context under 11 U.S.C. §§ 505 and 1146, but the plaintiff’s Complaint does not fall within the scope of either of those provisions. The Act is clear and unequivocal, and those limited exceptions to it are not applicable to this case. Accordingly, the court finds that it lacks jurisdiction to issue a declaratory judgment with respect to this tax issue. *See Sterling Consulting Corp. v. United States*, 245 F.3d 1161, 1165-66 (10th Cir. 2001), *cert. denied*, 534 U.S. 1114 (2002) (concluding that, if an exception to the statutory prohibition does not apply, then the Declaratory Judgment Act plainly bars a federal court from declaring anything that would impede the government’s ability to assess and collect taxes). The Complaint therefore is dismissed for lack of jurisdiction as to the IRS and IDR.

D. Remaining Defendants

As to the 29 other defendants who are named in the caption of this Complaint, the court finds that there are no allegations concerning them in the body of the Complaint. It appears that the list of defendants in

the caption is comprised of the debtor's Creditor Matrix and Lists of Unsecured Creditors. *See* R. 3, 17, 20. The plaintiff listed his creditors as defendants but set forth allegations against only a few of them. A complaint must state specific allegations against proper defendants named as defendants, and must identify who participated in each alleged activity. When the allegations of the complaint clearly demonstrate that the plaintiff has no claim whatsoever against defendants named in the caption, dismissal clearly is justified. *See Conley*, 355 U.S. at 45-46 (allowing dismissal of a complaint for failure to state a claim when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief").

The court has taken into consideration the pro se status of this defendant. It is well aware that the standard on a motion to dismiss, especially when the plaintiff is pro se, is a generous one and that it must take the facts in the light most favorable to the plaintiff. Usually a court should give a pro se litigant the opportunity to amend the complaint to overcome a deficiency – "unless it is clear than no amendment can cure the defect." *Stone*, 409 F. Supp. 2d at 1174. However, claims that are barred by res judicata, judicial immunity, and frivolousness are considered to be incurable defects. *See id.* (noting that "[f]rivolousness exists if the Plaintiffs would not be entitled to relief under any arguable construction of law or fact"). In some cases, pro se litigants have been allowed to amend a complaint to name a proper party. *See, e.g., Whitehorn v. F.C.C.*, 235 F.Supp.2d 1092, 1098 (D. Nev. 2002). In this case, however, it is clear that no amendment can cure the defects in this Complaint. The plaintiff was apprised of the Complaint's deficiencies in the responses of the defendants BOA and Cynthia Day, but he did not reply to their responses. The court has made clear that the Complaint fails with respect to the defendants BOA, IRS and IDR on jurisdictional grounds and with respect to the state court judge on the ground of judicial immunity. There are simply no allegations concerning defendant Cynthia Day and the other defendants, and the court will not allow the plaintiff to amend this Complaint for the purpose of starting afresh with allegations against them. It finds that, as to the named defendants for whom no allegations are raised in the Complaint, the Complaint fails to state any claim upon which relief may be granted. *See Conley*, 355 U.S. at 45-46. Accordingly, the court dismisses the Complaint against them pursuant to Rule 12(b)(6), for failure to

state a claim, or pursuant to Rule 12(b)(1), because it is a patently insubstantial complaint. *See Nietzke*, 490 U.S. at 326 (citing cases) (determining that complaint with attenuated, unsubstantial claims devoid of merit could be dismissed for want of subject matter jurisdiction).

Conclusion

For the reasons stated in this Memorandum of Decision, the court grants the Motion to Dismiss and dismisses the Complaint as to all defendants. The Motion to Dismiss of defendant Bank of America Mortgage Consumer Service is granted on the ground of lack of subject matter jurisdiction. The Complaint of plaintiff William Edwin Day is dismissed in its entirety, with prejudice, on grounds of lack of subject matter jurisdiction, failure to state a claim, and judicial immunity.

SO ORDERED.

/s/ Harry C. Dees, Jr.
HARRY C. DEES, JR., CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT